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SERVICE DATE - OCTOBER 27, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-104

TRAILER BRIDGE, INC.
v.
SEA STAR LINES, LLC

Decided: October 24, 2000

By complaint filed on July 1, 1999, Trailer Bridge, Inc. (Trailer Bridge or complainant) alleges that Sea Star Lines, LLC (Sea Star or defendant) has engaged in certain unreasonable practices in violation of 49 U.S.C. 13701(a)(1)(B).[1] Specifically, Trailer Bridge asserts that Sea Star is providing transportation service between the U.S. mainland and Puerto Rico at rates that are noncompensatory in an effort to disrupt the trade. Complainant further alleges that defendant's continuing violation of section 13701(a)(1)(B) has caused, and is continuing to cause, economic injury to Trailer Bridge in an as yet undetermined amount. Sea Star filed an answer to the complaint on July 26, 1999, in which it denied these allegations.

On January 7, 2000, Sea Star responded to complainant's first set of interrogatories and requests for document production. In its response, defendant refused to answer most of the requests because they allegedly sought confidential and irrelevant information, were burdensome, or were overbroad.

[1] Originally, Trailer Bridge also alleged a violation of the National Transportation Policy (NTP) set forth at 49 U.S.C. 13101(a)(1)(C) and (D) as a separate count of its complaint. In a decision served on December 10, 1999, the Board agreed with defendant that the NTP does not give rise to a separate cause of action. Thus, we dismissed Count I of the complaint, but noted that the policy guidelines set forth at 49 U.S.C. 13101 will necessarily inform our consideration of the remaining count.

On February 22, 2000, Trailer Bridge filed a motion for leave to file out of time[2] and a motion to compel discovery. Sea Star replied on March 13, 2000.[3]

On April 19, 2000, Sea Star filed a motion to compel responses to its first and second sets of interrogatories and requests for document production. Trailer Bridge replied on April 28, 2000, and also asked the Board to appoint an Administrative Law Judge (ALJ) to preside over any remaining discovery disputes. In a letter filed on May 4, 2000, Sea Star agreed with complainant's suggestion that the current disputes be referred to an ALJ.

DISCUSSION AND CONCLUSIONS

1. Administrative Law Judge.

While complainant has asked, and defendant has agreed, that the discovery disputes at issue be referred to an Administrative Law Judge for resolution, we are not persuaded that an ALJ is needed at this time to resolve the disputes between the parties. Accordingly, we will deny the parties' request for the appointment of an ALJ to handle discovery matters.

2. Complainant's Motion to Compel Discovery.

Trailer Bridge seeks to compel answers to seventeen interrogatories and three requests for document production.[4] Complainant argues that defendant prefaced its responses with a "totally inappropriate and totally incorrect argument about the substantive merit of Trailer Bridge's complaint." Specifically, complainant argues that Sea Star may not object to its interrogatories based on relevance because they are reasonably calculated to lead to the discovery of admissible evidence in establishing unreasonable practices by defendant. Trailer Bridge seeks information

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[2] Trailer Bridge notified the Board by letter filed on January 13, 2000, and again on January 28, 2000, that discovery negotiations were ongoing and sought to reserve the right to file a motion to compel should negotiations fail after the expiration of the time limitations established by our Rules of Practice to file such a motion. See 49 CFR 1114.31(a). Trailer Bridge admits that its motion to compel has been filed after this time period, but notes its previous attempts to gain an extension of time to file such a motion while discovery negotiations were ongoing. Trailer Bridge's motion is unopposed, is reasonable, and will be granted.

[3] On that date, defendant also requested issuance of a protective order, to which complainant replied on April 3, 2000. A protective order was issued in a decision served on May 10, 2000.

[4] Specifically, Trailer Bridge seeks complete responses to interrogatories 4, 6-7, 9-17, 18(c), 19-20, and 22-23, and document requests 1-3.

regarding Sea Star's operating costs, contractual relationships (to establish that Sea Star's corporate parents are subsidizing its operations),[5] and actual and maximum possible revenue per voyage (to establish that, even at full capacity, Sea Star's operations are noncompensatory).

Sea Star responds that complainant's interrogatories are not reasonably calculated to lead to the discovery of admissible evidence. Sea Star reasons that Trailer Bridge's complaint is, at its core, an allegation of below-cost pricing and is, therefore, an unreasonable rates claim, not an unreasonable practices claim. Thus, defendant argues, Trailer Bridge may only discover information reasonably calculated to lead to the discovery of admissible evidence in a rates case. According to Sea Star, discovery should initially focus on what rates, if any, fall outside the statutorily protected Zone of Reasonableness (ZOR) set forth at 49 U.S.C. 13701(d)(1). If any such rates exist, Sea Star suggests that discovery should then focus on whether the rates are outside a market cluster or if there has been a market failure in the U.S.-Puerto Rico trade.

Sea Star further argues that allowing Trailer Bridge broad discovery into its costs, revenues, and contractual relationships would contradict the pro-competitive policy embodied in 49 U.S.C. 13101(a)(4). Carriers in the noncontiguous domestic trade, defendant contends, would likely choose to raise rates rather than allow a competitor to file a complaint and give it access to commercially sensitive information. Finally, Sea Star notes that, to date, it has not received any response regarding its discovery requests of Trailer Bridge.

In Investigation of Motor Carrier Collective Practices, 7 I.C.C.2d 388 (1991), our predecessor, the Interstate Commerce Commission (ICC), dealt extensively with concerns raised by motor carrier interests over the extent of below-cost pricing in the motor carrier industry. There, the ICC considered both destructive competitive practices and predation. With regard to the former, the ICC's concern was with actual or eventual service failures rather than the financial distress among some of the competing firms in the trade. Id. at 429. Predation in the market was found to be unlikely as low barriers to entry would prevent the ability of a predator in the trucking industry to recoup losses with monopoly profits.

Nevertheless, the ICC indicated that it would consider fact-specific allegations of predation. Id. at 431. Special conditions in a given trade could allow a firm to benefit from predatory pricing. Such conditions include barriers to entry that would allow the predatory carrier to make up current losses with future monopoly profits without fear of attracting the same or new rivals; lack of information on costs that permits a firm to mislead rivals in the industry into believing it is the low-cost firm when it is not; and the ability of a firm to rely on deep pockets of internal funds while rivals are unable because of imperfections in the capital market to obtain financing.

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[5] Defendant is owned by Matson Navigation, Inc. (Matson) and Saltchuk Resources, Inc. (Saltchuk), formerly Totem Resources Corporation.

We believe similar concerns and considerations could be relevant in the context of a complaint about predation in the U.S.-Puerto Rico maritime trade. As such, information dealing with Sea Star's revenues and costs, economic conditions in the U.S.-Puerto Rico trade, the presence or absence of barriers to entry and exit to the market, the effects (if any) of defendant's conduct on competition in the industry, and any occurring or eventual public harm could be relevant.[6]

Accordingly, we conclude that Trailer Bridge may seek discovery of information which would support a finding of predation or destructive competition in the U.S.-Puerto Rico trade. Information regarding Sea Star's operating costs, revenues, and vessel capacity/utilization could be relevant to show whether and to what extent defendant is being operated without regard to competitive market forces. However, some of the information requests regarding Sea Star's corporate relationships are overbroad, as complainant can determine Sea Star's revenues and costs without delving into such relationships. We will, however, direct Sea Star to respond to narrowly framed inquiries into the effect of any subsidization by Sea Star's parents on its costs and revenues, as discussed below.

Finally, contrary to Sea Star's assertions, the ZOR is not dispositive of the determination to be made here. The ZOR is used to ascertain if specific rates are unreasonably high or low. As earlier indicated, Trailer Bridge is not challenging any specific Sea Star rate here but, rather, is challenging defendant's overall rate structure as predatory. For the same reason, we will not engage in a Georgia-Pacific type market cluster analysis in this proceeding.[7] With these general principles in mind, we now turn to more particular objections raised by Sea Star with regard to specific interrogatories and requests for document production.

Interrogatories 11 and 12 ask defendant to provide various financial documents and actual operating ratios derived from income statements beginning in January 1997. Sea Star has refused to answer these interrogatories on grounds that they are too broad and burdensome and

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[6] We are aware, as defendant pointed out in its motion to dismiss, that the Department of Transportation (DOT) prepared a report to Congress in 1997 discussing the noncontiguous domestic trade. See Department of Transportation Report to Congress on Competition in the Noncontiguous Domestic Maritime Trades (March 1997). There, DOT found that relatively low entry and exit barriers create a market environment where incumbent firms and potential entrants could capture market share from any carriers that attempted to raise rates above competitive levels. Although the DOT report suggests that Trailer Bridge may have difficulty making its case, it does not provide a basis for denying discovery geared to produce evidence that may be relevant to Trailer Bridge's case.

[7] See Georgia-Pacific Corp. – Pet. for Declar. Order, 9 I.C.C.2d 103 (1992), aff'd sub nom. Oneida Motor Freight v. ICC, 45 F.3d 503 (D.C. Cir. 1995) (Georgia-Pacific).

seek confidential material.[8] We disagree. These two interrogatories seek comparisons of Sea Star's revenues to its costs – information clearly relevant to a case of predation or destructive competition. Defendant will thus be required to respond to these interrogatories.

Sea Star refuses to answer interrogatories 19-20 and document requests 1-3 on grounds that they are irrelevant, unduly burdensome, and seek commercially sensitive material. Sea Star's relevance concerns again center around the premise that this proceeding involves an unreasonable rates claim, which we have addressed and rejected above. As for the claim that these interrogatories are unduly burdensome, we agree with defendant that number 19 is unduly burdensome on its face, as it seeks identification of every document which contains references to, or the facts contained in, any of defendant's answers to interrogatories. Accordingly, a substantial showing of relevance and need would be required to outweigh the burden of producing this evidence.[9] Trailer Bridge has not made such a showing here. An interrogatory which is worded as broadly as this one necessarily will be redundant and overlap with more focused interrogatories. Document request 1, which asks defendant to produce these documents, is similarly unduly burdensome and need not be answered.

In contrast, interrogatory 20 asks defendant to "[i]dentify all documents to which you have referred in your answers to the Interrogatories propounded above, or which you consulted in formulating your answers to such Interrogatories." This interrogatory is not unduly burdensome on its face and is reasonably calculated to lead to the discovery of admissible evidence, as it will allow complainant to verify defendant's responses. Document request 2, which corresponds to interrogatory 20, is likewise not unduly burdensome and defendant will be ordered to produce these documents. Document request 3 asks defendant to produce all documents which it has identified in the interrogatories. This is also not unduly burdensome and defendant will be directed to produce such documents.

Interrogatory 22 requests Sea Star to identify "all persons who have knowledge of the subject matter of the Interrogatories propounded above." Trailer Bridge has since clarified that it only sought identification of "management officials of Sea Star who have knowledge regarding Sea Star's revenues, its operating costs, its vessel capacity and its utilization of its vessel capacity." While the interrogatory as written is overbroad, we will grant the motion to compel a response to the interrogatory as narrowed.

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[8] We note that Sea Star has refused to answer a number of the discovery requests on the basis of confidentiality concerns vis-a-vis its direct competitor, Trailer Bridge. We take seriously those concerns, but are confident that the protective order issued previously in this matter will provide both parties with the proper level of security while not prejudicing the viability of Trailer Bridge's claim or Sea Star's defense.

[9] See FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022 (STB served Feb. 5, 1998).

Interrogatories 6, 9, and 16-17 deal with Sea Star's operating costs, and are thus relevant to a case of predation or destructive competition. Similarly, interrogatories 13-15 seek comparisons of Sea Star's revenues to its costs – information equally relevant to this type of proceeding. Interrogatories 10 and 13 seek information about vessel capacity utilization, while 18(c) asks defendant to identify the number of containers, trailers, automobiles, or other cargo transported on each voyage. This information is relevant in determining whether Sea Star's pricing structure can support its operating costs. As such, defendant will be directed to fully respond to these interrogatories.

The motion to compel as to interrogatories 4 and 23 will be denied because they are not reasonably calculated to lead to the discovery of admissible evidence or the evidence is available through less intrusive means. Both broadly inquire into Sea Star's corporate relationships and seek much information irrelevant to questions of predation and destructive competition. Interrogatory 4 asks defendant to "[i]dentify any agreements that exist between Sea Star, on the one hand, and, on the other, Matson, Tote, or Saltchuk and any other owner of Sea Star." As stated above, complainant can acquire relevant information regarding Sea Star's revenues and costs (including subsidization) without delving into the latter's corporate relationships. Further, the interrogatory is overbroad and unduly burdensome in nature.

Interrogatory 23 asks Sea Star to "[i]dentify the financial and other reports routinely provided to shareholders, particularly Matson and Tote, and describe the ongoing communication between Sea Star and Matson and Tote, noting any formal or informal reporting relationships." While there could arguably be admissible evidence contained in such reports, again there are less intrusive means to obtain it and we will not facilitate an unnecessary fishing expedition into Sea Star's corporate structure and operations. The interrogatory is also overbroad and burdensome. By contrast, although interrogatory 7 refers to Sea Star's corporate parents, it is very narrowly focused and seeks information directly related to complainant's argument that defendant is able to operate without regard to market forces because it is being subsidized by its parents. Accordingly, Sea Star will be directed to respond to this interrogatory.

In sum, we are directing defendant to respond fully to interrogatories 6, 7, 9-17, 18(c), 20, and 22 (as revised), and document requests 2 and 3. Sea Star need not answer the remaining discovery requests that are subject to the motion to compel.

3. Defendant's Motion to Compel Discovery.

Sea Star's first discovery request consists of 15 interrogatories and 3 requests for document production. The second consists of 6 additional interrogatories and 2 additional document production requests. To date, Trailer Bridge has failed to respond in any manner to either of Sea Star's discovery requests, despite the fact that our discovery rules require complete responses to such requests, unless specifically objected to. Trailer Bridge will be directed here to fully respond to defendant's discovery inquiries, or to formally object thereto, to the extent relevant and consistent with our discovery guidelines in this matter. We point out that

complainant only further delays the prosecution of its own case by failing to comply with discovery.

In light of our action here, we will deny defendant's motion to compel as premature. We fully expect, however, that Sea Star will inform us about Trailer Bridge's discovery responses, and defendant can file another motion to compel if it so chooses.

4. Additional Matter.

The Board entered a protective order in this proceeding on May 10, 2000, which provides, inter alia, that only outside attorneys, outside consultants, and reporters employed to record depositions may obtain highly confidential material.

Complainant advised the Board, by letters filed on May 12 and 26, 2000, that Mr. Edward Schmeltzer, Esq., Senior Vice President and General Counsel of Sea Star, should be barred from access to highly confidential infomation under the protective order. Moreover, as Sea Star is represented in this proceeding by the law firm of Schmeltzer, Aptaker & Shepard, of which Mr. Schmeltzer serves as lead counsel, complainant views the entire firm as falling within the restrictions of the protective order. According to Trailer Bridge, because of Mr. Schmeltzer's connection with both Sea Star and the law firm, the firm lacks the degree of full, complete professional independence necessary to be considered outside counsel. Thus, complainant contends, not only Mr. Schmeltzer but his entire firm should be barred from receiving highly confidential information in this matter.

Sea Star responded by letter filed on May 18, 2000. Defendant argues that the protective order does not require that it retain new outside counsel in order to obtain highly confidential information. Sea Star states that Trailer Bridge has not raised this point previously and characterizes complainant's argument as "a backdoor attempt" to disqualify defendant's outside counsel from the case. Sea Star contends that there is no rationale for excluding the entire firm, as courts and agencies exclude persons because they may be in a competitive decision making position for a party, not based on unsupported claims of lack of professional independence of outside counsel.

The Board's protective order states in pertinent part:

> 6. Other than as provided in Paragraph 7 below, "Confidential Information" and "Highly Confidential Information" may only be disclosed to "Authorized Persons." An "Authorized Person" is a person who, prior to the receipt of any "Confidential Information" or "Highly Confidential Information," has signed an undertaking (in the form attached to this Order) stating his or her identity, title and employer and that he or she has read and understands this Order and agrees to abide by it, and . . .

> . . . in the case of "Highly Confidential Information" is:
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> (x) an outside attorney (that is, not a regular employee of a party) actively involved in this proceeding, or a legal assistant or clerical employee under such attorney's supervision;
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> (y) a person who is an outside consultant (that is, not a regular employee of a party) actively involved in this proceeding and who has been employed by any of the parties to provide advice, expertise or assistance in this proceeding, or an assistant or clerical employee under such person's supervision; or
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> (z) a reporter employed to record depositions.

Based on this language, Mr. Schmeltzer, a Sea Star officer, is barred from access to highly confidential material, but the other attorneys and employees of Schmeltzer, Aptaker, & Shepard are not. The plain wording of the protective order makes it clear that the distinction between inside and outside attorneys will be determined by whether or not they are regular employees of the parties.[10] By the terms of the order, the members of the firm other than Mr. Schmeltzer are outside attorneys and not regular employees of Sea Star. Mr. Schmeltzer, in contrast, is a regular employee of Sea Star (much the same way that Mr. Gotimer, complainant's General Counsel, is a regular employee of Trailer Bridge) and is barred by the protective order from receiving highly confidential material.

5. Compliance with Discovery.

The parties are reminded that discovery can be broad and may be obtained "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding..." and it is not grounds for objection that non-privileged information sought would itself be inadmissible so long as the request "appears reasonably calculated to lead to the discovery of admissible evidence." 49 CFR 1114.21. In view of the additional guidance we have provided here, coupled with the issuance of a protective order, we expect the parties to fully cooperate with each other on discovery. Our Rules of Practice clearly state that "[e]ach interrogatory should be answered separately and fully in writing, unless it is objected to, in which case the reasons for objection should be stated in lieu of an answer." See 49 CFR 1114.21(a). Failure to answer or boilerplate, generalized responses are not sufficient to satisfy a party's discovery obligations. Similarly, the party propounding discovery requests should be mindful of the relevancy and other guidelines set forth here and proceed accordingly.

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[10] Such language was included in both Trailer Bridge's and Sea Star's proposed protective orders.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainant's motion for leave to file out of time is granted.

2. The parties' request for the appointment of an Administrative Law Judge to resolve discovery matters is denied.

3. Complainant's motion to compel discovery is granted in part and denied in part.

4. Defendant's motion to compel discovery is denied as premature, but complainant is directed to respond to all outstanding discovery requests.

5. This decision is effective on the date served.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary